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No. 6] NEW DELHI, MONDAY, FEBRUARY 17, 1958/MAGHA 28, 1879

ELECTION COMMISSION, INDIA

NOTIFICATION

New Delhi, the 17th February, 1958/Magha 28, 1879 Saka

S.O. 72.—Whereas the election of Shri T. D. Muthukumaraswami Naidu as a member of the House of the People from the Cuddalore constituency, has been called in question by an election petition duly presented under Part VI of the Representation of the People Act, 1951 (43 of 1951), by Shri S. Radhakrishnan, son of Subramania Padayachi, resident of Chitharasur, Palur Post, Cuddalore Taluk, South Arcot District, Madras State;

And whereas the Election Tribunal appointed by the Election Commission in pursuance of the provisions of section 86 of the said Act, for the trial of the said election petition, has, in pursuance of the provisions contained in section 103 of the said Act, sent a copy of its order in the said election petition to the Commission;

Now, therefore, in pursuance of the provisions of section 106 of the said Act, the Election Commission hereby publishes the said order of the Tribunal.

BEFORE THE ELECTION TRIBUNAL, CHINGLEPUT

PRESENT

Shri S. Rangarajan, M.L., Member, Election Tribunal, (District and Sessions Judge).

Tuesday, the 26th day of November, 1957

Original Petition No. 9 of 1957 and I.A. Nos. 154 and 166 of 1957

(Election Petition No. 254 of 1957, before the Election Commission of India, New Delhi).

BETWEEN

S. Radhakrishnan—*Petitioner.*

AND

1. T. D. Muthukumaraswami Naicker.
2. N. D. Govindaswami Kachirayar.
3. R. Srirangachariar, B.A., Returning Officer for the Cuddalore Parliamentary Constituency—*Respondents.*

This petition coming on for final hearing on Wednesday, the 13th day of November, 1957, before me, in the presence of Sri N. Panchapakesa Iyer, Sri N. Venugopala Nayagar and Sri G. Subramanian, Advocate for the petitioner, of

Sri R. M. Seshadri and V. R. Srinivasachariar, Advocates for the 1st respondent, of Sri C. R. Rajagopalachariar, Government Pleader, South Arcot District, for the 3rd respondent and the 2nd respondent being absent and set *ex parte*, and having stood over for consideration till this day, this Tribunal made the following

ORDER

The petitioner and respondents 1 and 2 contested for a seat in the Lok Sabha from the Cuddalore Parliamentary Constituency in which the 1st respondent was declared to be the successful candidate, having secured, according to the Returning Officer (who has himself been added as the 3rd respondent) 98,605 votes as against the petitioner's 98,546 votes. The 2nd respondent secured 34,549 votes. There were 158 invalid votes. The total number of votes that were counted were 3,31,858.

2. The present petition has been filed challenging the election of the 1st respondent. In the petition itself, a prayer was made for recount and to declare him as a successful candidate, if as a result of the recounting, the petitioner became entitled to the seat.

3. The following issues were framed:—

1. Whether the 3rd respondent is a necessary and proper party to this petition?

2. Whether a valid application in writing for a recount as contemplated under Rule 64 of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1956, was made by the petitioner to the 3rd respondent?

3. Whether there was a breach of any rule regarding the manner in which the counting took place, as alleged in paragraph 9 of the petition?

3(a) Whether the petitioner is entitled, without giving particulars of the alleged irregularities and illegalities to urge any irregularity or illegality in this petition?

4. Whether the postal ballot papers were counted behind the back of the petitioner or his agents as alleged in paragraph 22 of the petition?

5. Whether the Returning Officer sealed the postal ballot papers without making his endorsements thereon and then broke open the seal behind the back of the petitioner, and his agents and put his initials on the said ballot papers and again sealed them in a separate cover, as alleged in paragraph 23 of the petition?

6. Is the petitioner entitled to have the votes recounted?

7. Whether the Village Munsif of Singarikudi canvassed votes for the 1st 1st respondent?

8. Whether the Talayari of Manapathur village caused a tom tom to be effected inducing voters to vote for the 1st respondent?

9. Whether the village Munsif of Marungur took an active part in the election as against the petitioner and in favour of the 1st respondent?

4. *Issues 7 to 9.*—In paragraph 25, sub-paragraphs 5 to 7, allegations were made to show that there was no free election and P.Ws. 6 to 13 on the side of the petitioner and R.Ws. 2 to 8 besides the 1st respondent (R.W. 9) on the side of the respondents were examined in regard to those allegations. Sri N. Panchapakesa Iyer, who appeared for the petitioner, during the subsequent stages of the trial of this election petition, rightly stated and endorsed on the main petition that he was giving up issues 7, 8 and 9 and that he confined himself to the relief under Section 101(a) for recount and scrutiny and for declaration in the petitioner's favour, on foot of such scrutiny and recount. It is therefore unnecessary to deal with the oral evidence, which pertains to those issues.

5. *Issue 2.*—It was also stated in the petition that the petitioner had applied to the Returning Officer "in time" for a recount, that it was "designedly put into cold storage" and that the 3rd respondent "became interested in announcing the result without discharging his duties, *vis-a-vis* disposal of the petitioner's applica-

tion aforesaid demanding a recounting". The present petition was resisted not only by the 1st respondent, but also by the 3rd respondent, who was, in my view, needlessly added as a respondent.

6. It was stated *inter alia* by respondents 1 and 3 that the petitioner had failed to apply in time, *i.e.*, before the result was declared by the 3rd respondent, as contemplated under Rule 64 of the Rules framed under the Representation of the People's Act for the Conduct of Elections and Election Petitions and was therefore precluded from making an application for recount subsequently. It was further contended, as a matter of law, that a recount was not one of the reliefs, which could be granted by an Election Tribunal. A large volume of oral evidence was also let in on the question whether the petitioner applied in time or not for a recount before the 3rd respondent. But the importance of it became considerably minimised and almost disappeared after the Madras High Court decided on 24th September, 1957 in Writ Petition No. 635 of 1957 (*C. Nataraja Odayar and another* v. *K. Parthasarathi and others*) that a petition to avoid an election and claiming a seat on the ground of a miscount had always been held to be a proper election petition in England and the law was the same in India under the Representation of the People Act. Their Lordships referred to Section 101 of the Act, which empowers the Tribunal, if it is of the opinion that the petitioner or such other candidate, received a majority of valid votes, shall after declaring the election of the returned candidate to be void, and declare the petitioner or such other candidate as the case may be, as to have been duly elected, and to Section 81 of the Act, which enables the petitioner to found his petition on one or more of the grounds specified in Section 101. The following observations were made:—

> "The fact that there is a provision for a recount by the Returning Officer himself and that after the declaration of the result, he cannot entertain any application for a further recount [Rule 63(6)] cannot effect the right or jurisdiction of the Tribunal to have the votes re-counted for verifying whether there has been a miscount."

In view of this pronouncement, the learned Counsels appearing for the petitioner, the 1st respondent and the 3rd respondent did not even so much as refer to this question, during the course of their arguments.

7. However, I shall, for the sake of completeness, refer to the evidence on this question very briefly, before I proceed to discuss the only question which was finally argued, *viz.*, whether the petitioner is entitled to a recount and scrutiny.

8. In the petition, excepting the bald allegation that he had presented an application for recount before the 3rd respondent in time, no details were given. The details were furnished only during the course of the evidence. According to the petitioner, he was present when the figures of voting were announced by the 3rd respondent and even before he announced the result, he orally asked the 3rd respondent for a recount. The 3rd respondent asked him to give a petition. The petitioner gave a petition without stating the grounds, which was returned to the petitioner by the 3rd respondent asking him to state the grounds. Subsequently, he gave another petition (Ex. B-1) which he wrote in the counting hall itself and presented it to the 3rd respondent. The 3rd respondent did not pass any orders upon it, but announced the result of the petition and went away to his room. The petitioner and P.W. 5 went inside that room where the 3rd respondent merely stated that he had declared the result and that he could not say anything more about it. The 3rd respondent, on the other hand, who was examined as R.W. 1, denied these allegations and stated that the petitioner himself was not present when he declared the result and that some time after he had declared the result, the petitioner presented an application without stating the grounds, in which he wanted a recount, that he returned it and thereupon the petitioner presented another application asking for a recount. This petition itself was returned for affixing the requisite Court fee label and was finally dismissed.

9. The first petition, which the petitioner presented to the respondent and which was admittedly returned to him, has not been filed. The petitioner would very conveniently say that he has misplaced it. It is a fair inference that the same is not produced, because it would not support the petitioner's case. In support of petitioner's case that he had presented the petition before the result was declared P.Ws. 2 to 5 and 14 were examined, apart from the petitioner (P.W. 1). It will be seen that P.Ws. 2 to 5 who are all members of the same (Congress) party naturally support the petitioner. P.W. 14 is a member of the District Board, Education

Committee. He stated that at the time when the totals were being tallied, he came into the counting hall, which was in the upstairs of the building. P.W. 14 was not a counting agent. P.Ws. 2 to 4 and five others (not examined) were the counting agents of the petitioner. The 3rd respondent swore that he did not see P.W. 14 at all. P.W. 14 could not have been allowed inside the hall and could not have been present, because it is the evidence of the 3rd respondent, supported as it is by the Circle Inspector of Police on duty (R.W. 2), that till the results were announced, nobody excepting the authorised persons, who were already inside the hall, was allowed inside the counting hall. This is, as it should have been. It is not possible to accept P.W. 14's testimony that nobody prevented him, that he saw no police officer and that he either went upstairs or inside the counting hall. I have no hesitation in rejecting the evidence of P.W. 14.

10. Likewise, the evidence of P.Ws. 2 to 4, who swore that the petitioner was present at the time of the declaration of the result and he asked for a recount before the results were announced, has also to be rejected in the face of R.Ws. 1 and 2, who swore that the petitioner was not present in the counting hall on the second day (the counting went on for two days), when the result was declared. According to R.W. 1, the petitioner came to the counting hall after the results were announced. R.W. 2 swore that he remained in the hall for 15 minutes after the result was announced and that till he was there, the petitioner did not turn up at all. In view of the evidence of R.Ws. 1 and 2, which I have no difficulty in preferring to the evidence of P.Ws. 1 to 4 and 14, there can be very little difficulty in holding that the petitioner was not present in the hall when the results were declared.

11. P.W. 5 was not present during the counting. When he heard the passers-by saying that the 1st respondent had been elected, he went upstairs and took the petitioner inside the room of the 3rd respondent, where he was signing something. When P.W. 5 pressed the 3rd respondent for a reply, he stated "I have declared the result. I cannot say anything more about it." P.W. 5 did not see the petition given by the 3rd respondent and he could not even say whether the petitioner had gone inside the 3rd respondent's room before he took him inside that room. The evidence of P.W. 5 is therefore not of any material assistance to the petitioner. Even if it has an indirect bearing on the petitioner's case, in view of the positive testimony of R.Ws. 1 and 2, who are responsible officials and who are disinterested, their evidence alone has to be preferred. In fact, it must be stated to the credit of the 3rd respondent that he conducted himself in a very dignified and impartial manner. Even P.W. 4, who was asked about it, stated as follows:—

> "I said to petitioner that there was nothing wrong about the 3rd respondent, who had conducted himself in a dignified and impartial manner but that the clerks must have behaved improperly during counting because we were sure that petitioner was leading by about 300 votes."

This election petition, therefore, will have to be disposed of on the footing that the petitioner did not make a request in writing as contemplated under Rule 64 of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1956, before the results were declared.

12. *Issues* 3, 3(*a*) *and* 4 *to* 6.—The above finding, however, is not sufficient to dispose of the election petition, so far as the request for a recount made in the main petition, and for scrutiny made later (on 14th September, 1957), in I.A. No. 156 of 1957, are concerned. The petitioner also filed a petition to amend the election petition, I.A. No. 154 of 1957 on 11th September, 1957, but in the reply affidavit, which the petitioner filed, he has categorically stated that he did not want any amendment of the main petition. In the amendment petition itself, there was a further prayer that the particulars stated in that petition may be taken as particulars and that the election petition itself should be amended, if need be. For reasons best known to the petitioner, he stated in the reply affidavit that he was not pressing the relief of amendment. Sri N. Panchapakesa Iyer, the learned Counsel for the petitioner, insisted that the facts, which were stated in the petition for amendment should be taken into account. During the course of the cross-examination, R.W. 1 was questioned about the failure to allot more counting agents, for each candidate. Without any basis for it being laid in the main petition or without any particulars even being given, I considered that it was not fair that the 3rd respondent should be asked about them without notice or even without the concerned records being made available to him. Even at that stage, *i.e.*, on 10th September, 1957, no petition for amendment was filed or no particulars were

furnished. After the cross-examination of R.W. 1 was over and some more witnesses were examined by the respondents, the abovesaid amendment petition was filed. At the moment, it was presented, it contained some further prayers, but the then learned Counsel for the petitioner (Sri N. Venugopala Nayagar) confined his relief to only the reception of particulars or amendment, if need be, and did not press for any other relief. Even subsequently, no application was filed for recalling R.W. 1, for cross-examining him or even to let in any further evidence.

13. After the amendment petition was filed, I allowed evidence other than that covered by the amendment petition to be recorded, for both sides realised that the balance of the evidence pertaining to the recount also could be let in and R.W. 9 was examined. Even then, the petitioner's learned Counsel did not ask for any further evidence to be let in. In fact, when arguing the amendment petition, in answer to a specific question by me, the learned Counsel for the petitioner stated that he did not want R.W. 1 to be recalled, though such a request was made even in the reply affidavit.

14. At this stage, it will be convenient to notice the grounds on which the recount was asked for in the main petition:—

"*Paragraph* 9.—During the counting the petitioner's agents were not allowed to stir out of their seats while the counting of votes was being done, with the result that the petitioner has been deprived of his legal rights to exercise his vigilance over the counting. There is no knowing as to the gravity of the consequences of this attitude of the Returning Officer and the petitioner apprehends that as a result of the denial of the said legal rights, many irregularities and illegalities were allowed to pass muster; and the petitioner could only discover and bring to light the said irregularities and illegalities and other prejudices that have been caused to the petitioner in the course of the hearing and trial of this petition.

Paragraph 10.—The Petitioner and his agents who became apprehensive of the risk and danger involved in the procedure and process adopted by the Returning Officer demanded orally recounting so as to enable him to bring home to the Returning Officer the various irregularities connected with the election and the counting of votes. The petitioner was asked to put in a written application by the Returning Officer for demanding a recounting.

Paragraph 22.—The postal ballot papers were counted behind the back of the petitioner or his agents without affording any opportunity to the petitioner or his agents to find out the illegalities and irregularities.

Paragraph 23.—The Returning Officer sealed the postal ballot papers without making his endorsements thereon and then broke open the seal behind the back of the petitioner and his agents and put his initials on the said postal ballot papers and again sealed them in a cover—a procedure potential of great risks and dangers.

Paragraph 24.—The petitioner submits there has been a violation of the Rules and Regulations in more than one respect by the Returning Officer as a consequence of which the election has been vitiated to a degree.

Paragraph 25.—The petitioner also makes the following charges in the matter of the aforesaid election:—(It is not necessary to set out sub-paragraphs 1 to 3 because no details were given and they were not pressed).

Paragraph 25(4).—There are several instances of votes having been improperly rejected and there are also several instances of votes having been improperly received to tilt to the balance."

The prayers 2 and 3 (paragraph 27) were to the following effect:—

"(2) that a recounting be ordered after hearing the applicant;

(3) that the petitioner may be declared elected as a result of the said recounting if as a result of the recounting he becomes entitled thereto."

15. I have not referred to the allegations in paragraphs 10 to 21 of the petition, which pertain to the request by the petitioner for a recount before the 3rd respondent, because I have found, as a fact, that there was no request for a recount before the declaration of the result as contemplated by Rule 64 of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1956.

16. It may also be noticed at the outset that so far as the allegations, which were made in paragraph 25 (4), about votes being improperly rejected and improperly received, even at the time of framing the issues, the learned Counsel for the petitioner, Sri N. Venugopala Nayagar, did not ask for any issue to be framed on this question. Even when he was asked about particulars regarding the same, he did not give particulars. This has an important bearing regarding 'the rejected votes', though the position regarding 'votes received' could be different.

17. So far as the allegation that rules had been violated by the Returning Officer, the petitioner has not been able to point out violation of any rule, except stating that the Returning Officer admitted at first that he signed form No. 22, and then announced the votes secured by the candidates. But I do not think that it will be a ground by itself to set-aside the election, because under Section 100(1) (d) of the Representation of the People Act, it must be shown that the result of the election was materially affected by reason of the said irregularity. No attempt was even made to show that the result of the election has been affected by reason of such irregularity.

18. A point was raised about the postal ballot papers. R.Ws. 1 and 2 stated that the postal ballot papers also were counted. Much was sought to be made on account of the absence of uniformity in evidence regarding who were all present at that time. It is impossible for any one to recollect exactly who were all present at the time, at this distance of time. Even the exact manner of counting them cannot have any importance. The evidence of R.Ws. 1 and 2 being very clear on that question that the postal ballot papers were counted, their evidence alone has to be preferred. In fact, the petitioner did not even refer to the omission to count the postal ballot papers in the second petition, which he gave to the Returning Officer. The first petition, which is not filed, did not disclose any grounds or refer to the alleged omission to count postal ballot papers. If the postal ballot papers had not been counted, it would not have been omitted to be mentioned. There were 222 postal ballot papers of whom 24 were for the 2nd respondent, 104 for the 1st respondent and 94 for the petitioner. The 3rd respondent also swore that without taking into account, the postal ballot papers, the result could not have been arrived at. This fact is only too obvious. There is therefore no force in the contention put forward on behalf of the petitioner that the postal ballot papers were not counted. There was not even a whisper about the other allegation regarding the breaking open of the seal behind the back of the petitioner. There is no reference in the contention of the petitioner that on the second day, the votes were counted in a greater hurry than on the first day. This is opposed to facts, because 1,23,498 votes were counted on the first day, and 1,08,208 votes on the 2nd day, which means that having regard to the number of hours counted on both days, the pace of counting on the 2nd day was slower than on the first day.

19. The question that now falls for consideration is whether, in these circumstances, there is any justification to order a recount, and a scrutiny as prayed for in I.A. No. 166 of 1957. Whether recount and scrutiny have to be ordered or not, is a matter for judicial discretion, which however has to be exercised only on sound lines. It cannot admit of much doubt that the petitioner has claimed the seat, if as a result of recount, he is found to have secured the majority of valid votes. A criticism was advanced that there had been no specific allegation in the main petition that the petitioner had secured the majority of valid votes. The learned Counsel for the 1st respondent, therefore, argued that a relief in terms of Section 101(a) of the Representation of the People Act was made admittedly long after the time allowed for filing the election petition. He would therefore say that this relief itself having been asked only later than the time allowed by law, his request for recount ought not to be considered. I am afraid that there is no force in this contention, because it had been stated in the original petition itself that by reason of improper rejection and improper reception of votes, the balance was tilted. Even prayer No. 3 was expressed in such a way that did not leave any scope for doubt that the petitioner wanted himself to be declared as a returned candidate, if it was found as a result of recounting that he had secured a majority of valid votes. This is all that a petitioner might normally be able to allege.

20. Sri N. Panchapakesa Iyer, the learned Counsel for the petitioner, stated that Section 101(a) of the Representation of the People Act referred only to the finding of the Tribunal that the petitioner had received a majority of valid votes, which could be known only after a recount and therefore there was no point in insisting that the petitioner should assert, even before the recount is made, that he has in fact received a majority of valid votes. In my view, it will be altogether wrong to say that the petitioner has not asked for a relief under Section 101(a), in the main petition itself.

21. Now that the other points have been given up, the petition is confined to the relief of recount alone. It is seen from Form No. 22 (it was also admitted by R.W.1) that the invalid votes were 158 out of which it is seen 61 votes were polled for the petitioner, 67 for the 1st respondent and 30 for the 2nd respondent. These rejected ballot papers were brought to R.W. 1 for his scrutiny. Even apart from the fact that no issue was pressed to be framed on the basis of the allegations in paragraph 25(4) of the petition, in respect of the 158 ballot papers which were rejected, no serious complaint can really be made. R.W.1 also swore that he had rejected them himself.

22. There is no specific complaint that any particular ballot paper which was in petitioner's favour, was improperly rejected. According to the rules, the 3rd respondent had to give all facilities to the parties before rejecting them. The 3rd respondent swore that he had given every facility to all the counting agents and their candidates. P.W.4, one of the counting agents of the petitioner, stated positively as follows:—

> "All of us had ample opportunity to verify from the check slips the figures noted by the counting agents. To the extent to which we were able to verify from check slips, I must say there was no error."

Nor is there any specific complaint even by the petitioner or any of the agents that the Returning Officer did not scrutinise properly the rejected votes, excepting the bald allegation in this petition, in this regard, which was not seriously pressed even at the time of framing the issues.

23. The further question for consideration is whether any ballot paper which had to be rejected was not rejected. It is no doubt true that no issue could be taken in respect of such instances, nor could a specific plea be put forward, having regard to the very manner in which the counting took place. It would not have been possible for the petitioner to assert that any particular ballot paper, which had to be rejected, was included. The assistants of the 3rd respondent only took such of the ballot papers, as in their opinion had to be rejected. R.W.1's attention was naturally confined to such ballot papers as were brought to his notice, expecting doing some random check that was alone possible in the circumstances.

24. R.W.1 himself admitted as follows:—

> "Only a few bundles of counted ballot papers would be checked by me. It was not possible for me to count or random check every one of the bundles."

Therefore, unless the counting assistants themselves noticed any error in any ballot paper, it would not be brought to the notice of the Returning Officer. In this respect, there was no possibility of the counting agents exercising any real check on invalid votes being received, because, according to the arrangement, all the six counting agents of all the three respective candidates only sat in a row where their candidates' boxes were counted. In other words, in each of the row of six tables where the box of one candidate was counted, there was no representative of any other candidate or candidates. This has some bearing on the question whether all the votes received were valid, because the respective counting agents would not have been interested in bringing to the notice of the counting assistants or the Returning Officer any instance, even if noticed by them and failed to be noted by the counting assistants, of any defect in a ballot paper, which was included and counted. For this reason also, it is necessary to be assumed that no invalid vote has been received in the process and that there has been no miscount in this way.

25. In the counter to the application for amendment, the 3rd respondent stated as follows in paragraph 5:—

> "There has been no improper reception of excess votes and this respondent has not failed in the discharge of his duties. The instruction contained in the hand-book for the Returning Officers were strictly

followed. Rule 67 of the Rules comes after the declaration of the result of the election. The petitioner even now does not say how many votes were in excess in the several booths that he had mentioned and even now the petition is designedly vague and without any particulars in that respect. To the best of the knowledge of this respondent one or two cases of a small excess of one or two votes were then and there verified and checked and only valid votes were accepted."

26. The learned Counsel for the 1st respondent stated that this could not be taken into account, because this is only a counter to an application for amendment and the relief of amendment having been given up, the allegations in the counter also had to disappear. I do not think that this would be a proper way of dealing with admissions made by the 3rd respondent in the said counter.

27. The instructions in paragraph 90 of Hand-Book for Returning Officers (Part II) issued by the Election Commission of India in 1957, state that if as a result of tallying the total number of ballot papers with the connected forms, any deficiency in number of votes is actually found regarding the ballot papers inside the respective ballot boxes, it could not be a matter for any scrutiny, for the voters might have taken away the ballot papers instead of inserting them into the ballot boxes. It is manifest that it would not be possible for anyone to account for the deficiency. But with reference to the excess, however, different considerations ought to prevail. The following instructions have been given:—

"There should not however, be any excess. If there is, something is wrong and has to be investigated. Have the serial numbers checked of all the ballot papers found in the ballot boxes used at the polling station in order to detect and reject unauthorised ballot papers which may be found."

28. The learned Counsel for the 1st respondent next urged that the whole counter should be taken as a whole and it must be taken along with the further statement of the 3rd respondent that they were also detected and only valid votes were accepted. On this latter aspect, I fail to see, and nor has it been explained to me what kind of scrutiny would have been possible to find out the valid votes. It cannot be assumed, in such cases, without any further scrutiny, that the polling officers alone had made some mistakes, which were corrected by the Returning Officer. This statement of the 3rd respondent, therefore, causes considerable difficulty regarding the correctness of the counting. It has not been explained by him, and nor was any endeavour made by the learned Counsels for the respondents to explain, how the difficulty in the matter of excess votes, were solved only by verifying and accepting the valid votes. When such a large number of votes (2,31,858) were counted in the course of two days with a very large staff to help the 3rd respondent, the petitioner would only be able to say, in the absence of any scrutiny, that he apprehended a miscount. Even though the petitioner did not apply for a recount before the declaration of the result (which is explained by the evidence on the side of the respondents themselves, that the petitioner was absent, even though the petitioner would assert the contrary) it is still admitted that least soon after the results were announced, the petitioner turned up and gave an application for recount. The petitioner could have saved himself and others concerned all trouble, if only he had been present at the time of the declaration of result and asked for a recount in time.

29. It is no doubt true that provision for the inspection of certain records relating to the election have been made in Rule 138 of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1956. But Rule 138 itself provides that certain records should not be opened, except under the order of a competent Court or Tribunal. They are (a) the packets of unused ballot papers; (b) the packets of used ballot papers whether valid, tendered or rejected; (c) the packets of the counterfoils of all postal ballot papers; (d) the packets of the declarations of the candidates and the attestation of their signatures; and (e) the packets of the marked copies of the electoral roll or of the 1st maintained under sub-section (1) or sub-section (2) of Section 152.

30. There is therefore no substance in the complaint of the contesting respondents that in respect of the ballot papers, which were counted as valid, the petitioner should have given more details. In the very nature of things, it would not be possible for any petitioner to state, when votes were counted on a large scale and by so many persons, especially when the counting agents of each candidate were not able to supervise the counting of votes of the other candidates, that ballot papers which had to be rejected were wrongly accepted.

31. It being settled law that a recount could not be had as a matter of right, the petitioner has no doubt to show the existence of certain circumstances, which would be *prima facie* sufficient for the Tribunal's discretion in the matter of ordering recount being exercised, it being also at the same time clear that when the petitioner only suspects a miscount and more so, in a case where he thinks that miscount may be due to arithmetical errors or even as in this case some invalid votes being counted and received, there cannot be in the very nature of things more than a mere expression of an apprehension about it.

32. His Lordship Mr. Justice Rajagopala Ayyangar in the aforesaid decision (C. Nataraja Odayar and another v. K. Parthasarathi and others—Writ Petition No. 455 of 1947) has observed as follows:—

> "In this connection we have to point out that there is a clear distinction between a recount called for by reason of a complaint of a miscount and scrutiny. A petition to avoid an election and claiming a seat on the ground of a mis-count has always been held to be a proper election petition within Section 5 of the Parliamentary Elections Act, 1868, as a petition complaining of an undue return [Section 107(1) of the (U.K.) Representation of the People Act 1949]..... .....The law is the same in India under the Representation of the People Act."

Having regard to the principles set out by His Lordship Mr. Justice Rajagopala Ayyangar, the only question for consideration in this case is, whether the circumstances require a recount to be ordered (issue 6).

33. His Lordship attached some significance to the discrepancy between the number of ballot papers in Form No. 16 and Form No. 22 accounts. In this case, the discrepancies between Form No. 16 and Form No. 22 are admitted in the counter filed by the 3rd respondent:—

> *"Paragraph* 5.—In some cases the ballot paper account were not correctly sent by the Presiding Officers and whenever it appeared at the time of counting that there was any apparent difference between Form No. 16 and Form No. 22 in any polling station the ballot papers were verified with reference to the serial numbers contained therein and only such serial numbers as were authorised for use at the particular booth were accepted as valid and the rest rejected. The ballot paper account in Form No. 16 could not be corrected because they were signed by the respective Presiding Officers, who were not present at the time of counting. In such cases, it is only the ballot paper account that were not properly entered and hence there was no excess whatever in any polling booth. There has been *no improper reception of any excess votes.* The petitioner, his agents and his counting agents were fully aware at the time of counting what there were no excess votes at all. If there was any such excess votes improperly received, the petitioner, his agents or counting agents would not allow it to pass muster. Under these circumstances even if there is an apparent discrepancy, between Form No. 16 and Form No. 22 it is submitted that Form No. 22 represents exactly the number of valid votes polled.
>
> *Paragraph* 7—The shortage in Nellikuppam is 71, Cuddalore 78, Villupuram 51 and Ulundurpet 66, numbering a total 266. The ballot papers have been properly accounted for.
>
> *Paragraph* 8.—This respondent cannot say whether any forms are missing and if so which of the forms. There are 6 forms in Cuddalore area in which the Presiding Officer has not mentioned the Polling Station number. There are 2 forms for Ulundurpet without Polling Station number. There is one form bearing No. 87 without the constituency name. There is one form without the name of the constituency and without the number of the Polling Station. There are 6 forms in Nellikuppam constitutency without the number of Polling Station. In one form in the said area there is neither the Polling Station number nor the name of the village. There are two forms in Villpuram without Polling Station number. Under these circumstances the best that can be said is that the Presiding Officers in those respective booths did not correctly fill up the forms."

Even without taking into account, the particulars furnished by the petitioner in the affidavit in support of I.A. No. 154 of 1957, it is the duty of the Tribunal to take note of the said admissions in considering whether the discretion to order recount should be exercised in the petitioner's favour or not.

34. With reference to the discrepancies between Form No. 16 and Form No. 22, the significant observations of His Lordship Mr. Justice Rajagopala Ayyangar are as follows:—

> "This discrepancy (referring to the discrepancy between Form No. 16 and Form No. 22 might be capable of an explanation which in consistent with the counting having been correct. But miscounting might be one explanation for the discrepancy and so long as this cannot be eliminated, we consider that taking into account the margin by which the returned candidate succeeded at the polls the order for a recount in the present case was justified."

In that case, the difference was only 81 votes in a Double Member Constituency for the General Seat, the petitioner having obtained 24,939 votes, and the 1st respondent 25,020 votes. His Lordship further observed as follows:—

> "In this connection we might refer to the fact that in England where a petition is filed claiming a seat and merely praying for a re-count so as to ascertain the correct number of votes given to each candidate, the modern practice is to order a re-count before the trial, where there is reason to believe that there has been a miscount."

35. Writ Petition No. 635 of 1957 has been sought to be distinguished on the ground that in that case 187 excess votes were proved to have been received. When the facts of that case, the decision of the Tribunal and the petition are scrutinised, it is seen that the exact number of excess votes were not alleged and there was no evidence about it, except a bare allegation of 'excess votes'. The 187 votes referred to represent the deficiency. It was urged that in case that six thousand odd votes which were rejected, were admitted to have been rejected, not after proper scrutiny and that the Returning Officer himself admitted that he could not say whether the counting was correct or not. But the facts of two cases may be identical. The question which is one of fact, is whether the circumstances in this case are sufficient to order a re-count.

36. His Lordship Mr. Justice Curgenven in Lakhshmana Aiyar *v.* Rajan Aiyar (58 M.I.J. 118) observed that a Court can order a re-count when it is satisfied that there is room to doubt the correctness of the original count. Proof that the count at the election was wrong is unnecessary. It is enough to support the application by affidavit. Usually nothing more can be alleged than cause to suspect the original count. This decision was relied upon by the Election Tribunal, Nagapattinam, against which Writ Petition No. 635 of 1957 was filed in the High Court.

37. The English practice in this regard has been set out in Fraser's "The Law of Parliamentary Elections and Election Petitions" (Second Edition) (I have not been able to secure any later edition) as follows at pages 209:—

> "A petition may be lodged claiming the seat on the ground that the petitioner had a majority of lawful votes, but praying only for a re-count of the votes without alleging any corrupt or illegal practice or asking for a scrutiny. In such a case the petition does not go to trial, but the practice is to issue a summons at the Election Petitions Office, returnable before one of the election judges applying for an order that the votes may be recounted before the assistant to the prescribed- officer. The application should be supported by affidavit showing grounds for supposing there has been a miscount. Where the majority is a very small one the application is, as a rule, allowed almost as of course."

It will be thus seen that though it is true that a request for re-count will not be ordered as a matter of course, this is subject to an exception in cases where the majority is narrow. What is a narrow majority is a question of fact. The petitioner claims that the majority is narrow. R.W. 1 specifically stated that the difference between the petitioner and the 1st respondent was narrow. One cannot doubt the fact that the difference is very narrow in this case—a fact which has been admitted on all hands.

38. In the Punjab North (M) Case (*Raja Ghazanfar Ali* v. *Chaudhri Bahawal Bux and others*) reported in The Indian Election Cases by Hammand, Volume II, page 218, the following observations have been made at page 219:—

> "Counsel for the respondent has relied upon the English practice, according to which each party has to deliver before trial a 'list of votes intended to be objected to and of the heads of objection to each such vote'

(*vide* Rogers on Elections 19th Edition, Volume II, page 298). But the English practice is supported by a specific rule on the point (see Rule 7, Election Petition rules). The present petition cannot obviously be held to be bad for want of particulars, as there is no such rule in force in India. As regards the question whether we should require the particulars to be supplied under the general provisions of the C.P. Code, or on the analogy of the English practice, we consider that there is much force in the contention of the petitioner, that he cannot be expected to furnish any definite particulars until there is a scrutiny of the ballot-papers and he has an opportunity to inspect them properly. * * * * It is, therefore, clear that the petitioner was not in a position to inspect the ballot-papers and obtain the necessary particulars before lodging his petition. * * * But it would be scarcely possible for a candidate or his agent to obtain at that time such definite particulars as regards the votes to be objected to, as are required in England to be delivered on a scrutiny petition (cf. Forms of scrutiny list at page 937 of Rogers on Elections, Volume II, 19th Edition). The petitioner has filed an affidavit stating the procedure that was adopted by the returning officer at the time of counting the votes, and alleging that it was impossible for him to scrutinize all the ballot-papers, as four persons were sorting them. The affidavit was not filed with the petition but the counsel for petitioner has explained that he was doubtful on the point, as no definite procedure was prescribed by the Indian rules. He has, however, expressed his readiness to file the affidavit at the very first hearing and the point is, therefore, not material. The respondent has not filed any counter affidavit denying the correctness of the allegations made in the affidavit filed by the petitioner. We think that, in the circumstances, the petitioner or his agent could not have had sufficient opportunity to scrutinize the votes and that he cannot be reasonably required to give the necessary particulars without a further and careful inspection.

The petitioner has alleged in his petition that he would be found, on a scrutiny of the votes, to have had a majority of votes and this is practically all that is *essential* to allege in such a petition in England (*vide* Fraser's Law of Parliamentary Elections and Election Petitions, 3rd Edition, page 234). It was urged that in the Tanjore case, a recount was refused when it was prayed for on the basis of 'nebulous allegations' (*vide* 1 I.E.P. page 223 at page 227). But it appears that the application for a recount was made in that case only during the course of the inquiry. In the present instance, the petition itself is chiefly for a scrutiny and recount and both have been specifically asked for in the petition. Moreover, it is to be remembered that the respondent Bahawal Bux, in the present instance, had a very narrow majority, *viz.*, of 3 votes only over the petitioner. In England, when the majority is a narrow one, a recount is granted almost, as a matter of course (*vide* Fraser's Law of Parliamentary Elections and Election Petitions, 3rd Edition, page 222)."

39. A distinction was sought to be made on the ground that an application has been made for scrutiny in the course of the petition. But this does not matter, because a prayer for recount has been made in this case in the main petition itself. Even if an application for scrutiny was made at the end of the trial of the petition, that would not be a ground for not granting recount altogether, because there are no rules framed on the subject in India. I also find that in the *steppay* case (1886), 4 O'M, & H. 49 referred to at page 346 of Rogers Parliamentary Elections & Petitions, (Nineteenth Edition) Volume II, a recount was asked for at the close of scrutiny, and was allowed, despite the English Rules of practice to the contrary, though Denman, J., observed, in granting the application, that it should have been made at an earlier stage.

40. Particularly, in the absence of any other rule, procedure or practice in India, to the contrary, there could properly be speaking no legal objection if a request for scrutiny was made later. In this case, the prayer for recount has been made in the main petition itself. The application for scrutiny, which has been made during the course of the petition in this case could not be validly objected to, though, as I have indicated, the extent of scrutiny to be allowed, is a different question.

41. The present case has to be decided in accordance with the principles set out in the Punjab North (M) case, rather than in the Tanjore case, which is reported in the Hammond's Reports of the Indian Election Petitions, Volume I (1922 Edition), page 223. It was stated there, that during the course of an enquiry, an application was made on the "nebulous allegation" of the agent, about the counting of batches of votes, twice over. That is not the case here, The observations of His Lordship Mr. Justice Rajagopala Ayyangar in the aforesaid decision are even somewhat different from what has been stated in the Tanjore case. It was not stated in the Tanjore case, as was stated by His Lordship Mr Justice Rajagopala Ayyangar, that a recount could be granted only when "specific instances" are "substantiated" by "reliable" "*prima facie* evidence All that is stated by His Lordship Mr. Justice Rajagopala Ayyangar is that a recount will not be granted as a matter of right.

42. The learned Counsel for the 1st respondent urged that the grant of recount in this case would be only granting it as a matter of right to the petitioner. I am afraid this is hardly the way of stating the position, because, as I pointed out, though the English practice is not to grant a recount as a matter of right, still where the difference is narrow, it is usual to grant a recount.

43. The observations of His Lordship Mr. Justice Rajagopala Ayyangar, which have been extracted above, show that especially when there are discrepancies between Forms No. 16 and Forms No. 23, which discrepancies might be capable of explanation, consistent with the counting having been correct, miscounting might be one explanation for the discrepancies and so long as this could not be eliminated, an order for recount might be justified. Looking at the present case, from that angle, having regard to the admitted fact that there are discrepancies between Form No. 16 and Form No. 22, and more so having regard to the possibility of not eliminating even the fact that invalid votes might have been included in the counting, as valid votes, and particularly when there is no possibility of excluding miscounting, in the circumstances, it will not only be proper for the Tribunal to order a recount, but it is the duty of the Tribunal to do so. Otherwise, as it is pointed out by Sri N. Panchapakesa Iyer, it might even be a case of the Tribunal refusing to exercise a jurisdiction vested in it.

44. The learned Counsel for the 1st respondent pointed out that under the guise of applying for amendment, the petitioner cannot say that despite his not wanting the amendment later, the allegations of fact made in the affidavit in support of the petition ought to stand on the ground that they have been 'lodged' into Court, as stated by the learned Counsel for the petitioner, as particulars which he is bound to give. This contention would have some force but for the fact that some of those allegations at least have been admitted. It will not be therefore correct to say that even the extent to which such facts are admitted, they should not be taken into account. Nor do I think it will avail the learned Counsel for the 1st respondent to say that any admission by the 3rd respondent cannot be used against him.

45. As a matter of fact, Section 83 of the Act does not require details to be mentioned, except in relation to corrupt practices, on pain of the petitioner being unable to add fresh instances later by way of amendment. All that is required by Section 83 (1) of the Act is a concise statement of the case by the petitioner. When the petitioner alleges that he apprehends a miscount, he can substantiate it by facts which are established during the trial and this can also be established at the trial, so far as it pertains to the possibilities of mistake in counting. It would be another matter however if the petitioner wanted to add to his grounds by relying on the violation of any particular rule, in the absence of details in the petition, for in respect of them, the contesting respondents can insist that they should have notice. It was in this view that I did not allow the petitioner to put questions in cross-examination to the 1st respondent on 10th September 1957 about breach of any particular rule, in the absence of any definite particulars. But such facts as have a bearing on the question of whether a mistake could have taken place in counting, I do not think that the petitioner is prevented from relying on facts brought out during the trial in support of the allegation of miscount, which has been already made in the petition. The admissions in the counter affidavits of the 3rd respondent, though in answer to the petition for amendment, would be available to the petitioner for this purpose. In this view, it is needless to premit the petitioner to rely for the present purpose upon any of the facts stated by him in support of the two I.As., merely, as facts stated by him, except those that have been admitted in the counters to these applications. In this view and subject to the above observations, I.A. No. 154 of 1957 is dismissed, but without costs.

46. I may however add that even without taking into account any of the admissions in the counter affidavit of the 3rd respondent having regard to the narrow majority, the statement made in the petition that the petitioner suspects a miscounting, the manner in which the counting agents of the respective candidates were seated (which did not give them opportunity to notice whether any votes for the other candidates had not been improperly received and the possibility of this happening) a recount ought to be ordered. Statutorily, the petitioner has a right to claim a seat on the ground that he has secured the majority of the valid votes. Such a petition cannot be disposed of satisfactorily except by a recount in the circumstances. This is not the same thing as saying that the petitioner is entitled to recount as a matter of right, for as I have stated, though in cases where the majority is narrow, English practice is to allow a recount. As I stated earlier, I have no doubt that the majority is narrow in this case.

47. In addition, there is also the hard fact that the petitioner at least filed a belated application for recount before the 3rd respondent, which says that he at least suspected that the counting was not proper. Evidently, the petitioner lost his opportunity to ask for a recount, even before the Returning Officer by not asking for a recount in time, which would have been dealt with according to the rules by the Returning Officer. The only difficulty is, having failed to do so, obviously under an apprehension that he would be prevented from asking for a recount later on, if he did not allege that he had made an application before the Returning Officer 'in time', the petitioner went to the extent of making wild and unfounded allegations against the 3rd respondent and made him a party to this petition and also tried to support his case, that he had presented a petition in time, by obviously perjured testimony. The conduct of the petitioner in resorting to these extravagant and false allegations could only have a bearing on the question of costs.

48. Having found that the petitioner is entitled to a recount, the question is whether the petitioner is entitled to scrutiny also. In this context, the fact that the petitioner did not even press for an issue regarding the votes improperly rejected or refused has an important bearing. With reference to the rejected votes, I have no doubt that the petitioner is not entitled to scrutiny of these votes, because R.W. 1 swore as follows:—

> "I told my assistants that if any vote had to be rejected that had to be brought to me for orders. * * * I allowed reasonable opportunities to the candidates or their agents to inspect the rejected ballot papers."

I accept his evidence on this question and find that on the face of it, there cannot be any scrutiny of the rejected ballot papers.

49. Even though I find that the postal ballot papers were counted, I consider that they can be recounted, in order to see whether any invalid ballot papers have been received, for the evidence is not uniform regarding the actual supervision on behalf of the respective candidates. If there are such invalid ballot papers, then in the case of postal votes or in the case of votes found in the ballot boxes, they would be eliminated during the recount.

50. I, therefore, find that it is necessary to have a recount of the ballot papers, *other than the* (158) *rejected ballot papers*, and the postal ballot papers *alone*. I also prefer that the ballot papers may be counted in my own presence (a course adopted by Donman J., in the *Steppay* case (1886), 4 O'M. & H. 49) with such help from the Revenue Officials as may be available and who are conversant with the procedure to be adopted in counting ballot papers. The counting will, of course, proceed with due regard to the secrecy of the ballot papers. A form of the order of recount in England has been printed at pages 933 and 934 of Rogers Parliamentary Elections & Petitions, Volume II (Nineteenth Edition). It has been mentioned therein that all necessary precautions should be taken to preserve the secrecy of the ballot papers. This will accordingly be done. The scrutiny will obviously consist in considering the objections to the validity of any ballot paper, which perhaps may be possible to decide then and there. I.A. No. 166 of 1957 is ordered to the above limited extent. There will be no separate order as to costs in that I.A. During the course of the recount, such discrepancies between Form No. 16 and Form No. 25 (whether there is any excess) will also be investigated, since the recounting will be done in my presence, I shall give such further directions, if any, as may be necessary. The time and place of recount will be fixed in consultation with the Collector of South Arcot District

and after hearing the parties further on this question. It is not possible to estimate precisely what the cost of the recounting might be. I direct that the petitioner will also deposit a sum of Rs. 500 in cash on or before 7th December, 1957, so that the balance of the unspent amount, if any, can be repaid to the petitioner. The petition will be called on 7th December, 1957 for that purpose.

51. The only other matter to be decided is whether the 3rd respondent is a necessary party to this petition. I have already found that the allegations made against the 3rd respondent are completely without foundation. If the recount has become necessary, it was not on account of anything, which the 3rd respondent himself did or omitted to do. The Returning Officer is not one of the parties, who has to be impleaded in election petition. Section 82 of the Representation of the People Act requires that a petitioner shall join as respondent to the petition (a) where the petitioner, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected all the contesting candidates other than the petitioner, and where no such further declaration is claimed(all the returned candidates; and (b) any other candidate against whom allegations of any corrupt practice are made in the petition. It was clearly unnecessary for the petitioner to have impleaded the 3rd respondent. It was observed by the Court of the Election Commission of Punjab in a decision reported in *Chaudhri Govardhan Das* v. *Rao Bahadur Chaudhri Lal Chand* (61 Indian Cases 315) that the Returning Officer cannot be made a party respondent in an inquiry into the validity of an election, and where such inquiry is necessitated by the action of the Returning Officer, the parties should be left to bear their own costs, even if the result of the inquiry may be to render the election invalid. I find that the 3rd respondent was not a necessary party to this petition. The 3rd respondent, who was defended by the State, is entitled to his costs from the petitioner, which I fix at Rs. 350. Orders regarding the costs of the petitioner and the 1st respondent in the main petition will be passed later in the light of the recount.

N.B.—I am marking an agreed copy of the judgment in Writ Petition No. 635 of 1957 on the file of the High Court, Madras, as Ex. C-1, for purposes of reference.

Dictated to the Shorthandwriter and pronounced by me in open Court, this the 26th day of November, 1957.

(Sd.) S. RANGARAJAN, Member, Election Tribunal.
(District and Sessions Judge, Chingleput).

Petitioner's Exhibits

A-1/4-3-1957. List of contesting candidates in Form No. 7-A for the Election to the House of the People from the Cuddalore Constituency, published by 3rd respondent.

A-2/8-3-1957. Office copy of the intimation regarding counting issued by the 3rd respondent to the petitioner and respondents 1 and 2.

A-3/12-3-1957. Office copy of memo by the 3rd respondent to the petitioner.

A-4/22-3-1957 Letter from 3rd respondent to the petitioner.

A-5/21-3-1957. Petition by the petitioner to 3rd respondent.

Respondents' Exhibits

B-1/12-3-1957 1 (a) Application by petitioner to 3rd respondent.

B-2/12-3-1957. Portion showing initials with time and date by 3rd respondent (marked on Ex. B-1).

B-1 (b)/ do Endorsement calling for the original petition on the back of Ex. B-1.

B-2/13-3-1957. Petition by petitioner to Deputy Secretary to Government, Madras.

B-3/11-3-1957. Authorisation form appointing Sri B. M. Rejan as counting agent by petitioner.

B-4/	do	do	Sri R. Kanakarathna Raja	do
B-5/	do	do	Sri S. Natarajan	do
B-6/	do	do	Sri Lakshminarayan	do
B-7/	do	do	Sri Kesavan	do
B-8/	do	do	Sri T. E. Radhakrishnan	do
B-9/	do	do	Sri S. Kennan	do

B-10/11-3-1957 and 12-3-1957 — Final result sheet (Form No. 22) for the Election to the House of the People for the Cuddalore Constituency.

B-10(a)/12-3-1957. — Entries noted in Ex. B-10 under the Head number of votes polled.

B-10(b)/ do — Certified copy of Ex. B-10 and B-10 (a).

B-11/ — Plan of counting hall-Cuddalore Parliamentary Constituency.

B-12/12-3-1957. — Declaration of the result of election for the House of the People, Cuddalore Constituency.

B-13/21-3-1957. — Vakalat of petitioner engaging Sri S. K. Sowndararajan, Advocate, Cuddalore B. T.

B-14/11-3-1957. — Form (Printed) R. H. 7 Chackslip—Election to the House of the People—204 Legislative Assembly, 60 constituency.

B-15/11-3-1957. — Form No. 19 appointment of Election Agent Sundarajan by the 1st respondent to the Cuddalore Parliament Constituency.

B-16/14-3-1957. — Report submitted by the 3rd respondent to the Deputy Secretary to Gvernment, Madras, through the Collector of South Arcot, Cuddalore.

Exhibits marked by Court

C-12/4-9-1957. — True copy of the Order in writ Petition No. 635 of 1957 of the High Court, Madras.

Petitioner's Witnesses.

1. S. Radhakrishnan (petitioner).
2. R. M. Rajan.
3. Laskhminarayana Padayachi.
4. Kanakarathina Raja.
5. Ethirajan.
6. Jayaraman.
7. Shanmugha Padayachi.
8. Sabapathi.
9. Chandrakas Samithar.
10. Seetharaman.
11. Vadivelu Padyachi.
12. Chinnapayyan.
13. Kasinathan.
14. Narayanasami.

Respondents' Witnesses

1. Srirangachari (3rd respondent).
2. Samuel.
3. Rangasami Naidu.
4. Audhimoola Goundar.
5. Kesavan.
6. Krishnamoorthi Naidu.
7. Kumarswami Padayachi.
8. T. D. Muthukarswami Naidu (1st respondent).
9. Narayanswami Naidu.

(Sd.) S. RANGARAJAN, Member, Election Tribunal,
(District and Session Judge, Chingleput).

BEFORE THE ELECTION TRIBUNAL, CHINGLEPUT

PRESENT:

Sri S. Rangarajan, M.L., Member, Election Tribunal, (District & Sessions Judge).

Friday, the 31st day of January, 1958

ORIGINAL PETITION No. 9 OF 1957

(Election Petition No. 254 of 1957 before Election Commission of India, New Delhi).

BETWEEN

S. Radhakrishnan—*Petitioner.*

AND

1. T. D. Muthukumaraswami Naidu.
2. N. D. Govindaswami Kachirayar
3. R. Srirangachariar, B.A., Returning Officer for the Cuddalore Parliamentary Constituency—*Respondents.*

This petition coming on for further hearing before me, (after recounting at Cuddalore) on 11th January, 1958, and on 20th January, 1958, in the presence of Sri N. Panchapakesa Aiyar and Sri G. Subramaniam, Advocate for the petitioner of Shri V. R. Srinavasachariar, Advocate for the 1st respondent, of Shri C. R. Rajagopalachariar, Government Pleader for the third respondent and the 2nd respondent being absent, and the petition having stood over to this day for consideration, the Court made the following.

ORDER

In pursuance of my Order dated 26th November, 1957, further hearing of the petition was posted at Cuddalore on the 6th January, 1958, on which date, the procedure to be adopted for recounting and scrutinising was discussed. The procedure prescribed in respect of counting of votes could not be applied completely in the matter of recounting of votes, because, whereas in the case of the original count, the ballot boxes are opened and the votes distributed to the various counting tables the position of recounting these votes is in a sense the reverse in the matter for one had to start with the packets which had been counted already and tied up in bundles of 100 or less in respect of each candidate. The recounting actually commenced from 7th January, 1958 and went on till 10th January, 1958. Though it was a very arduous process the recounting and scrutiny were done so carefully and thoroughly that both sides expressed that they were satisfied with the way in which it was done. The votes of the 2nd respondent were not recounted as it was found unnecessary. Both parties gave a memo stating that it was unnecessary to recount the votes of the 2nd respondent for any purpose.

2. The ballot papers as well as the postal ballot papers of the petitioner and the 1st respondent which had been received as valid, alone were recounted, for in my abovesaid order, I stated that I would not recount the rejected ballot papers. I directed that the postal ballot papers also which had been received as valid, to be recounted only for the purpose of seeing whether any invalid ballot paper had been received, for the evidence was not uniform regarding the actual supervision in this regard, on behalf of the respective candidates.

3. I have dictated to my Stenographer then and there all that happened at Cuddalore from 6th onwards till the 11th, on which date both parties were heard further. (I shall call that the "Proceedings of the Election Tribunal at Cuddalore" or merely "Proceedings" for the sake of brevity. They have been perused and signed by both sides from time to time, in token of their consent, I considered it necessary to take the signatures of both sides to it in order to make it difficult for either of them to dispute, what happened during the recount). Since the petitioner's Advocate was absent on the 11th, he requested that further arguments may be heard at Chingleput. For this purpose, it was adjourned to 20th January, 1958. Both parties were heard on the 20th. In view of the contentions raised on behalf of the petitioner, especially with reference to the absence of the distinguishing marks, *i.e.*, rubber seals indication,

tne number of the respective polling stations on some ballot papers the learned Counsel for the 1st respondent requested that the report sent in this behalf by the Returning Officer to the Election Commission and the orders passed thereon, may be sent for. The Election Commission was accordingly addressed to send those records. The hearing of the Election Petition was therefore adjourned to 28th January, 1958. On which date further arguments were heard and the papers received from the Election Commission were marked as Exhibits B-17 to B-19. The 3 orders issued by the Election Commission relating to this question were marked as Exs. C-2 to C-4. They had been sent to this Tribunal by the Election Commission even when cases were originally sent to it for enquiry.

4. I shall at first state the result of the recount. The petitioner was found to have received 98,482 ordinary votes as against the 1st respondent's 98,489 ordinary votes. The 1st respondent has also received 103 valid postal votes as against petitioner's 94. The total number of votes in favour of the 1st respondent therefore was 98,592, as against the petitioner's 98,576 votes, thus reducing the difference to 16 votes, as against 59 at the former count. It must be noticed that the said 98,592 votes do not include particularly 9 votes polled in favour of the 1st respondent at the polling station No. 39 of the Nellikuppan Constituency for the reason that those ballot papers contained numbers which were outside the numbers issued to that particular polling station. Under Rule 57(2)(d) of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1956, a ballot paper has to be rejected if it bears a serial number, or is of a design different from the serial numbers or, as the case may be, design, of the ballot papers authorised for use at the particular polling station. These votes were rejected as invalid, since those ballot papers bore numbers outside those issued to the polling station No. 39 Sri V. R. Srinivasachariar, the learned Counsel for the 1st respondent, also fairly conceded that they had to be so rejected.

5. 98,576 votes found to have been obtained by the petitioner include 4 ballot papers on which the serial number does not appear, because in the process of cutting of those ballot papers, the numbers appear to have been cut in the middle. Those ballot papers however bore the rubber seal (the distinguishing mark) of the polling station. A ballot paper could be received as valid, only if it bears the serial number within those allotted to that polling station and according to Rule 57(2)(d) referred to above, if a ballot paper bears a serial number different from that authorised for use at that particular polling station, it would have to be rejected. It was on this principle that the abovesaid 9 votes polled in favour of the 1st respondent at polling station No. 39 of Nellikuppam Constituency were rejected. The abovesaid 4 votes which were thus polled in favour of the petitioner were those polled at polling station Nos. 3, 26, 43 and 65 of Ulundurpet Constituency In polling station No. 3, the rubber seal No. 60/3 was found on the ballot paper in question and the serial number 1725 appeared at the left hand corner and "A/12 48" appeared at the right hand corner, the rest of the numbers having been cut. In polling station No. 26, though on the ballot paper the distinguishing mark of the rubber seal 60/26 was found, the number 1725 alone appeared on the left hand side and A/12 506 appeared on the right side the rest of the numbers had been cut. Similarly in polling station No. 43, the number 6725 appeared on the left hand side of the ballot paper and A/12 52 on the right hand side, though it bore the rubber seal of the polling station. In polling station No. 65 also, one ballot paper, though it bore the distinguishing mark of the polling station, did not bear the complete serial number. All these four votes were allowed to be received tentatively, subject to my deciding it later, if it became necessary to do so. Having regard to the fact that even if these four votes are deemed to be valid, even then 1st respondent has a majority of 16 votes, it is really not necessary to decide this question. But for the sake of completeness, I shall decide this question also. It seems to me that on the same principle on which the nine ballot papers of the 1st respondent were rejected in polling station No. 39 of the Nellikuppam Constituency, the above four votes also have to be rejected. A uniform principle has to be adopted on this question and the proper thing to do therefore would be to reject those four votes also as invalid. This would increase the difference of votes between the petitioner and the 1st respondent to 20 votes. The petitioner therefore obtained only 98,572 votes, four votes less, as against 98,592 votes.

6. During the course of the recount, I have dealt with in my "Proceedings" (which forms part of the records in this O.P.) various objections have been raised from time to time and difficulties encountered during the recount. I have dealt with and met them in the "Proceedings". It is therefore needless now to refer to the "Proceedings" at any length.

7. I shall now only refer to the argument, which has been put forward on behalf of the petitioner with reference to the ballot papers which do not bear the distinguishing mark (rubber seal showing the number) of the polling station. Before doing so, I shall also set out the various categories of deviations from Rule 57, which were observed during the recount. There have been worked out from the checkslips maintained during the recount.

	Petitioner	1st Respondent
1. Ballot papers without the distinguishing marks of the polling stations	249	298
2. Ballot papers bearing the distinguishing marks of two polling stations	36	11
3. Ballot papers bearing wrong distinguishing marks of polling stations	43	Nil
Correction of the number in the rubber seal of the ballot papers	13	Nil
TOTAL	341	309

In all the above cases the serial number of the ballot papers was within those authorised for use by the concerned polling station.

8. With reference to category 1, I must say that during the course of the recount, no objection was raised by either side to the counting of the above votes either cast in favour of the petitioner or the 1st respondent and they were all received and counted as valid votes. So far as categories 2 and 3 are concerned, I have passed orders receiving those votes to be counted in favour of the petitioner, which can be found in the "Proceedings". So far as category 4 is concerned, no objection was raised on behalf of 1st respondent to the reception of the 13 votes in favour of the petitioner.

9. I have however considered it necessary to refer to all the four categories, because if in any view, all those votes have to be discarded, even then it would not affect the result of the election, for there were a greater number of such votes polled in favour of the petitioner (341) than the 1st respondent (309). Precisely for this reason, the learned Counsel for the petitioner did not advert to categories 2 to 4 (for it was not in his interest to do so) but confined his attention to category 1 alone. With reference to category 1, where no distinguishing marks of the polling station were found, he contended, after the results were summed up and long after the recounting was over, that those votes alone should be treated as invalid votes and that if it is done, the number of such votes being only 249 for the petitioner as against 298 for the 1st respondent, he would have 49 more votes on this head alone, which would be sufficient to wipe off the deficiency of the 20 votes and give him a majority. It is pertinent to notice even in this connection that no such objection was raised even at the time of recounting because the petitioner had no data in his possession as to how such a contention, if raised, would affect him.

10. It is necessary to refer to Rule 57. The corresponding old rule was Rule 47. Rule 57(2) reads as follows:—

"The returning officer shall reject a ballot paper—

* * * * *

(c) if it does not bear any mark which it should have borne under the provisions of sub rule (2) of rule 27:

Provided that where the Election Commission on being satisfied that any such defect as is mentioned in clause (d) or clause (e) has, in respect of any of the ballot papers at a polling station, been caused by any mistake or failure on the part of the presiding officer or polling officer, has directed that he defect should be overlooked, a ballot paper shall not be rejected merely on the ground of such defect."

Rule 27(2) reads as follows:—

> "Every ballot paper shall before issue to an elector be stamped with such distinguishing mark as the Election Commission may direct."

It may also be noticed in this context that the Election Commission has also issued three orders, which have been marked as Exs C-2 to C-4. The material portion of Exc.C-2, which is styled as a Statutory Order (S.O.No. 13/56 dated 20th February, 1957) reads as follows:—

> "Under the Proviso to the abovementioned clause (e) of sub-rule (2) of rule 57, the Election Commission hereby directs that in every case where the Returning Officer is satisfied that the distinguishing mark has not been stamped on a ballot paper in accordance with the Commission's directions on account of any mistake or failure on the part of the presiding officer or polling officer, but the ballot paper is one which was authorised for use at the particular polling station and was in fact issued to an elector at that polling station during the poll, the said defect shall be overlooked and no ballot paper shall be rejected by a Returning Officer merely on the ground of such defect.
>
> The Commission further directs that the Returning Officer of every constituency shall report to the Commission the total number of ballot papers which were found not to bear the appropriate distinguishing mark but which were accepted as valid and counted on the authority of the present direction of the Commission."

Ex. C-3 was issued in partial modification of Ex. C-2 on 28th February, 1957. The Election Commission directed as follows:—

> "Every case where a ballot paper does not bear the distinguishing mark, and such defect is overlooked by the Returning Officer, shall be promptly reported to the Commission for its formal approval, but the counting of votes need not be suspended pending the receipt of such formal order."

Ex.C-4 is a further direction by the Election Commission on 13th March, 1957, which says that the discretion already given to the Returning Officers was with a view not to hold up the declaration of the results, pending references by the Returning Officers and at the same time, it pointed out that it would be safer to have formal orders of the Commission in respect of each individual constituency in this regard, even if the same was passed *ex post facto*. The Returning Officer were directed to report immediately to the Commission about the total number of ballot papers which were found not to bear the appropriate distinguishing mark or marks, but were accepted as valid and counted on the authority of the general direction of the Commission. It was further made clear that the Commission would exercise such powers to pass formal orders only if two essential conditions were satisfied viz., (1) that the ballot papers concerned were authorised for use at the particular polling station; and (2) that they were in fact issued to the electors at that polling station during the poll.

11. It was in pursuance of these directions that the Returning Officer reported (the reports have been marked as Exs. B-17 and B-18 to the Commission, after they were sent to me by the Election Commission direct when I asked for them). According to Ex.B-17 dated the 12th March, 1957, the Returning Officer reported that it was found among other things that 1053 ballot papers were without distinguishing marks which he did not consider material and that in all those cases, the defects were overlooked and counted. He requested that his action may be approved. By means of Ex.B-18 dated the 16th March, 1957, the Returning Officer wrote further to the Election Commission, in continuation of Ex.B-17, that all the ballot papers concerned were authorised for use at the particular polling station and in fact issued to the electors at the concerned polling stations during the poll. By means of Ex. B-19 dated 24th March, 1957, the Election Commission informed the Returning Officer as follows:—

> 'I am directed to refer to your letters . . dated the 12th and 16th March, 1957 and to state that *the Commission is satisfied* that the absence of the appropriate distinguishing mark on ballot papers mentioned therein used at the election in the Cuddalore Parliamentary Constituency and referred to in your letter, was caused by the *bona*

fied mistake or failure on the part of the concerned Presiding Officer or Polling Officer. The Commission accordingly approves your action in overlooking the said defect in accordance with the directions of the Election Commission under the proviso to sub-rule (2) of rule 57 of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1956, and in not rejecting any such ballot paper merely on the ground of such defect."

(The Italics are mine).

It is thus seem from the above Statutory Orders and directions of the Election Commission, reports of the Returning Officer and the approval given by the Election Commission, particularly with reference to the ballot papers which did not bear the *appropriate distinguishing marks, that they met with the approval of the Election Commission* and that the Election Commission was *satisfied* that those votes were properly received as provided by the proviso to Rule 57(2).

12. But the learned Counsel for the petitioner attacked the Statutory Orders and the other directions of the Election Commission and contended (1) that the Election Commission had no such power to express satisfaction *ex post facto*: and (2) that the proviso to Rule 57(2) which has been added by the Act of 1951, cannot have the effect of curtalling or whittling down the ambit of Rule 57(2)(e).

13. On point No. 1, the learned Counsel for the petitioner sought to derive support from the observations of the Supreme Court in *Hari Vishnu* v *Ahmad Ishaque* (A.I.R. 1955 Supreme Court 233). But it has got to be noticed that the Supreme Court was dealing with the rules as they stood previously and with Rule 47. The corresponding provision, in the old Rules, to the present rules was 47, which stated that "a ballot paper contained in a ballot box shall be rejected" (b) "in the case where a direction had been issued under rule 20 that the ballot paper should contain an official mark, it did not contain the official mark." Rule 20(1) directed that the "Election Commission might direct that before any ballot was delivered to an elector at a polling station, it should be marked with such official mark as may be specified by the Election Commission in this behalf, and the official mark so specified should be kept secret." There was no proviso to Rule 47 whereas to the present rule 57(2) there is a proviso. Dealing with the rules as they stood then, the Supreme Court pointed out that the Returning Officer was bound to reject a ballot paper, and that the Returning Officer had no power under Rule 47 to accept a vote, which had no distinguishing mark. In that case, there were inter-changeability of ballot papers in several places and the Election Commission had issued direction that the rule as to the distinguishing mark, which the ballot paper should bear, might be relaxed if its approval was obtained before the vote is actually counted. Their Lordships pointed out (even without any power conferred on the Election Commission expressly to that effect as it has now been done under the proviso to Section 57(2) that the Election Commission, which had the authority of prescribing the distinguishing mark could also alter it, *provided that it related to the election as a whole*. The Supreme Court pointed out that if any alteration of the original distinguishing mark is made, it must be made before the commencement of the poll and that the approval by the Election Commission subsequent to the polling could not render valid the ballot papers which did not bear the distinguishing marks prescribed for the election. It was with a view to meet this difficulty that not only Rule 57(2) differently worded, but the above proviso was also enacted.

14. The learned Counsel for the Petitioner however contended that despite the rules having been now worded in the manner set out above, the Election Commission could not by a general order deviate from the provisions, which have been laid down by Rule 57(2) (d) and (e) or express its satisfaction even in advance. I do not think that by issuing Exs. C-2 to C-4 the Election Commission has already expressed satisfaction in advance. The Election Commission directed that the Returning Officer should receive the votes even without distinguishing marks, provided the Returning Officer was satisfied that they were the ballot papers, which were authorised for use at that polling station. It also took care by means of Exs. C-3 and C-4 to direct that even though the counting of votes and declaration of results need not be held up pending references, the formal orders of the Commission should be obtained *ex post facto* and the Commission also laid down two conditions (noticed above) for the Commission to give its permission *ex post facto*. The learned Counsel for the petitioner is therefore not correct in saying that it had delegated any power to the Returning Officer or had substituted the satisfaction of the Returning Officer in the place of the satisfaction of the Election Commission.

15. The learned Counsel for the petitioner also cited some decisions to show what was the nature of the satisfaction that the Election Commission must have. I am of the view that there is no need to go into these citations, because in this particular case, the Election Commission had directed that the Returning Officer could overlook the defect of any ballot paper not bearing the appropriate distinguishing mark, if the said ballot paper is authorised to the particular polling station and report that fact to the Election Commission for its orders. The Returning Officer alone was the officer, who could inform the Election Commission, as a fact, whether such a ballot paper without the distingishing mark, had in fact been issued to the particular polling station or not. On receiving such a report from the Returning Officer, the Election Commission could have no further difficulty in satisfying itself that despite the absence of distinguishing mark the ballot paper could be validly received and counted, as having been issued to the particular polling station. I do not see how this involves any delegation of any power, because the Commission had reserved to itself the right to express its approval or not, in respect of the ballot papers in question. The Election Commission would be well within its right in asking for a report from the Returning Officer as to whether such ballot papers were authorised to be issued to the polling stations in question and thus satisfy itself about it and pass orders *ex post facto*, on the basis of the report of the Returning Officer.

16. In the face of the new rules, the Statutory Orders and the directions of the Election Commission, the report by the Returning Officer and the Election Commission's ultimate order of satisfaction expressed in Ex.B-19. I do not see any force in the contention of the learned Counsel for the petitioner that the ballot papers which did not bear the distinguishing mark ought not to be received as valid votes. It is not disputed that in respect of the ballot papers coming within the first category the Returning Officer had made his report to the Election Commission.

17. It is worth recalling that the petitioner chose to wait till the recount was made and the results were gathered in order to see whether he could raise such an objection, for if under category 1, the petitioner had more votes than the 1st respondent, it would not have been in his interest than to raise such a contention! These have already been received by me as valid votes and I do not see how it could be questioned at this stage. I am further of the opinion that even if it can be so questioned, in view of what I have pointed out above, there is no force in the petitioner's point No. 1.

18. On point No. 2, the learned Counsel for the petitioner contended that the proviso itself cannot whittle down the earlier Rule 57(2)(e) and in this connection, has referred to a few decisions. It was pointed out in *Perichiappa* v. *Nachiappan* (A.I.R. 1932 Madras 46) that a proviso should receive a strict construction and that it is not open to the Court to add words to a proviso with a view to enlarge the scope of the proviso. It was observed that the proviso must be restricted to the scope reasonably conveyed by the words used therein.

19. The learned Counsel for the petitioner relied upon yet another decision reported in *E.I.Ry.* v. *Jot Ram-Chandra Bhan* (A.I.R. 1928 Lahore 162), which held that in order to bring a case within the exception, strict compliance with its terms is necessary

20. Reliance was also placed upon the Full Bench decision of the Madras High Court reported in *The Commissioner of Income-Tax, Madras* v. *Messrs. A. Suppan Chettiar & Co.*, (58 M.L.J. 46) that a proviso should not be construed as, by mere implications, withdrawing any part of what the main provision in the section has given.

21. The learned Counsel for the Petitioner still further relied upon the decision of the Privy Council reported in *M. & S.M. RY CO. LTD.* v. *Bezwada Municipality* (1944 II M.L.J. 25) that the proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case.

22. He next relied upon the decision in *Ranghu Nath Das* v. *Collector of Dacca* (6 Indian Cases 457) a decision of the Calcutta High Court, which held that when statutory rights of an exceptional character have been created, the conditions prescribed by the statute for the exercise of such rights must be strictly fulfilled and if an attempt was made at merely nominal compliance with the provisions of the statute in the exercise of such rights, the Courts were not powerless to afford relief to a person, who was aggrieved by the adoption of such a course.

23. In this connection, he finally relied upon the decision reported in *Brindaban Bihari Lal* v *Badri Prasad* (A.I.R. 1949 Patna 335) that a statute conferring a new jurisdiction ought to be strictly construed.

24. On a perusal of these cases, I am unable to see how they are of any assistance to the petitioner. It is seen that Rule 27(2) requires every ballot paper to be stamped, with such distinguishing mark as the Election Commission may direct and Rule 57(2) directs that if there is no such mark, the Returning Officer was bound to reject it, only subject to the proviso that if the Election Commission on being satisfied that any such defect was by mistake or failure on the part of the presiding officer or polling officer, *has directed* that the defect should be overlooked, the ballot paper shall not be rejected on the ground of such defect. The learned Counsel for the petitioner stressed upon the words *"has directed"* and stated that this direction should be anterior to the election. In this case, the earlier circular (Ex. C-2) and even the later circular (Ex. C-3) were issued prior to the election which took place on 6th March 1957. If a direction has to be issued prior to the polling, the direction can be given only in general terms. This is not a case where the Election Commission had dispensed with its own satisfaction in favour of the Returning Officer, for it had directed the Returning Officer to get its approval at least *ex post facto*. I am unable to see how the proviso curtails or whittles down anything which had been prescribed under Rule 57(2)(e). There is no need to import any words which are not there. Rule 57(2)(e) and the proviso thereunder are plain. There is also nothing unreasonable in the course adopted by the Election Commission. In fact, only if the votes are counted, occasion would at all arise, to know whether any ballot paper did not contain the seal of the appropriate polling station and they were or were not authorised for use at the particular polling station. I am unable to find any force in point No. 2, which has been raised on behalf of the petitioner.

25. In the result, I find, as a result of the recounting and scrutiny made by me, that the 1st respondent has succeeded by a majority of 20 votes. The 1st respondent was therefore validly declared as a successful candidate. The petition fails and is dismissed with costs. 1st Respondent's Vakil's fee is fixed at Rs. 500. The other costs incurred by the 1st respondent will be separately taxed.

Dictated to the Stenographer and pronounced by me in open Court, this the 31st day of January, 1958.

(Sd.) S. RANGARAJAN, Member, Election Tribunal.

(District and Sessions Judge, Chingleput).

Petitioner's Exhibits marked after Recount

Nil

Respondents' Exhibits marked after Recount

B-17/12-3-1957—Letter No. Ref. V. 1/1715/57 from the Returning Officer, Cuddalore Parliamentary Constituency, to the Election Commission of India.

B-18/16-3-1957—Letter No. Ref. V. 1/1715/57 from the Returning Officer, Cuddalore, Parliamentary Constituency, to the Election Commission of of India.

B-19/24-3-1957—Letter No. 495/7/57/3644-45 from the Election Commission of India to the Returning Officer, Cuddalore Parliamentary Constituency.

Exhibits marked by Court after Recount.

C-2/20-2-1957—Statutory Order No. 13/56 of the Election Commission of India.

C-3/28-2-1957—Direction No. E.I. (D)/70/56 of the Election Commission of India.

C-4/13-3-1957—Direction No. E.I.(D)/72/56 of the Election Commission of India.

Witnesses examined by both sides after Recount.

Nil

(Sd.) S. RANGARAJAN, *Member, Election Tribunal.*
(District and Sessions Judge, Chingleput.

[No. 82/254/57.]

By Order,
S. C. ROY, Secy.

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